

TREASURY EXECUTIVE MINUTE

Minute No.

26 February 2010

Treasurer

TELECOMMUNICATIONS LEGISLATION AMENDMENT (COMPETITION AND CONSUMER SAFEGUARDS) BILL 2009 — PROPOSED AMENDMENTS (RELATES TO MINISTERIAL NOS. 67374 AND 67375)

Timing: Urgent. We are advised that the Bill is to be debated in the Senate in the week commencing 9 March 2010. Your approval is required by **3 March 2010**.

Issue: The Minister for Broadband, Communications and the Digital Economy has sought your agreement for amendments to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 ('the Bill') that would allow for the authorisation of conduct under Part IV of the *Trade Practices Act 1974* (TPA) relating to compliance with undertakings for Telstra to structurally separate. (See letter at [Attachment A](#).)

Recommendation: That you **sign the attached letter** at [Attachment B](#) to the Minister for Broadband agreeing to the proposed amendments.

Signed/Not Signed

Signature:

...../...../2010

KEY POINTS

- The original Bill proposed a package of reforms to improve telecommunications competition regulation and consumer safeguards, with measures designed to provide incentives for Telstra to structurally separate on a voluntary basis. Specifically, the Bill requires:
 - Telstra to undergo functional separation, or provide an undertaking acceptable to the ACCC to structurally separate; and
 - Telstra to divest its Foxtel interests and hybrid fibre coaxial (HFC) network, or provide an acceptable undertaking to structurally separate, if it wishes to participate in advanced wireless broadband spectrum auctions.
 - : For an undertaking to be effective it must be accepted by the ACCC (subject to Ministerial direction).
- Senator Conroy proposes a number of amendments to the Bill, including to exempt conduct by parties under a structural separation undertaking from breaching the operation of Part IV of the TPA. The amendments follow an inquiry by the Senate Standing Committee on Environment, Communications, Information Technology and the Arts.
 - Part IV of the TPA relates to restrictive trade practices and includes prohibitions against anticompetitive contracts/arrangements, price fixing and cartels, misuse of market power, and anti-competitive mergers.
 - : Certain conduct that would otherwise breach Part IV of the TPA can be authorised by the ACCC following a public benefit assessment, or can be specifically exempted under subsection 51(1).

- The proposed excepted conduct includes that which Telstra is required to engage in to comply with a structural separation undertaking, the preparation or giving by Telstra of a structural separation undertaking, the entry into or variation of related contracts that contain ‘asset provisions’, and certain conduct by a party to an undertaking-related contract.
- The effect will be to combine the ACCC scrutiny of the structural separation undertaking and potential authorisation of conduct into a single process.
- The Department of Broadband has advised that the amendment is fit-for-purpose following queries on the operation of the amendment and scope of the exception. The ACCC also broadly supports the amendment.
 - The exception (under section 51 of the TPA) will operate in relation to conduct in compliance with an undertaking approved and enforced by the ACCC, rather than specific authorisation of the act or thing by the legislation.
 - : This will place a greater burden on the ACCC’s approval of a structural separation undertaking to ensure that there are no loopholes that would allow parties to inappropriately benefit from an exception to Part IV.
 - The scope of the conduct subject to the exception is not clear, as the matters to be addressed in a structural separation undertaking and the assessment process are not determined.
 - We consider that these matters that can be appropriately addressed between the Department of Broadband and the ACCC, and should not prevent your approval of the proposed amendment.
- The Minister for Broadband has also sought the agreement of the Prime Minister to a further range of amendments relating to the operation and enforcement of the undertakings, and the telecommunications access regime. Agreement is also sought for a range of ‘backpocket’ amendments to assist the passage of the Bill through the Senate. (Additional Information and Attachment C refer.)
 - We have been consulted on and support the proposed amendments.
- Currently there are ten Federal Acts or Regulations that draw upon the section 51 exception from the Part IV provisions of the TPA.
 - For example, a section 51 exception is provided for the *Northern Territory National Emergency Response Act 2007* for actions relating to the Government’s licensing of community stores.
- The following areas have been consulted in the preparation of this minute: Competition Policy Framework Unit; and the ACCC.

Contact Officer:

Manager
Communications and Infrastructure Access Unit

ADDITIONAL INFORMATION

FURTHER AMENDMENTS

The Minister for Broadband has sought the Prime Minister's approval for additional amendments to the Bill (see letter at Attachment C). The main amendments include measures to:

- clarify undertaking process — such as, Ministerial directions and guidance to the ACCC, and preventing the revocation of a Ministerial exemption from HFC and subscription TV undertakings);
- permit Telstra to seek shareholder approval for a proposed undertaking;
- clarify the scope of undertakings — that is, limiting extra-jurisdictional application, allowing for an independent telecommunications adjudicator and ACCC performance of functions and powers;
- improving enforcement of undertakings;
- give priority to structural separation of Telstra process over functional separation — for example, extending the timeframes for function separation requirements if structural separation is being progressed;
- clarifying the relationship between the separation undertakings and the TPA — particularly, the compliance with competition and access provisions.

Approval has also been sought for a range of 'backpocket' amendments including proposals for further consultation on separation requirements and removal of payphones, a review of Part XIC of the TPA, and the enforcement of industry codes.

LETTER FROM MINISTER FOR BROADBAND SEEKING YOUR APPROVAL

[Pages 5-6 have been redacted under
s.22]

DRAFT LETTER FOR SIGNATURE



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Senator the Hon Stephen Conroy
Minister for Broadband, Communications and the Digital Economy
Parliament House
CANBERRA ACT 2600

Dear Minister

Thank you for your recent letter seeking my agreement for amendments to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the Bill) that would allow for the authorisation of conduct under Part IV of the *Trade Practices Act 1974* relating to compliance with an undertaking by Telstra to structurally separate.

I agree to the amendments you have outlined. Given the implications of the amendments for the work of the Australian Competition and Consumer Commission (ACCC), I would ask that your Department continue to work closely with the ACCC to ensure the effective operation of the proposed amendments.

Yours sincerely

WAYNE SWAN

[Pages 9-19 have been redacted under s.22]